Supreme Court
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No. 93-2020

In The

Supreme Court of the United States

October Term, 1994

JOYCE PERKINS,

Petitioner,

vs.

WESTERN SURETY COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit erred in failing to vacate its judgment where same case was on appeal to the Mississippi Supreme Court, and the Mississippi Supreme Court made a ruling de novo as to the award of attorneys' fees for Western Surety Company and other surety companies similarly situated?

2. Whether facts in this case involve substantive rules of state law that should be followed by federal tribunals in order to avoid forum shopping?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court below were:

Appellant: Joyce Perkins

Appellee: Western Surety Company, A South Dakota Corporation with its principal place of business in Sioux Falls, South Dakota. The parent corporation of Western Surety Company is Surewest Financial Corporation. Western Surety has no non-wholly owned subsidiaries.

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OPINIONS BELOW, JURISDICTION, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction and Statutory and Regulatory Provisions involved are correctly set forth in the Petition.

STATEMENT OF THE CASE[1]

A. BACKGROUND PROCEEDINGS

On August 6, 1985, the Chancery Court of Warren County, Mississippi, appointed Joyce Perkins as administratrix of the Estate of Robert Taylor, Deceased, and required a $200,000.00 administratrix bond. On that same date, Joyce Perkins as principal entered into an application for bond with Western Surety in the penal sum of $200,000.00. Contained within the bond application was an indemnity agreement which expressly states as follows:

> The undersigned hereby certify the truth of all statements in the application, and jointly and severally agree:
>
> * * *
>
> (ii) to completely indemnify the Company (Western Surety) from and against any liability, loss, costs, attorneys fees and expenses whatsoever which the Company shall at any time sustain as surety or by reason of having been surety on this bond or any other bond issued for applicant or for the enforcement of this agreement.

On September 10, 1986, a relative of the deceased was allowed to intervene and to file a Complaint against Joyce Perkins, individually and as administratrix under the

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[1] Since this is Petitioner's second appeal of this matter to this Court, the Statement of the Case contained the present appeal is a verbatim replica of the Statement of the Case in Cause No. 91-1574, except that the chronology has been continued since the date of the last appeal.

bond, as well as Western Surety as the administratrix's surety. On the same day, Western Surety filed a cross-claim against Joyce Perkins individually seeking reimbursement for attorneys' fees and expenses incurred in its defense of its interest as surety under the administratrix bond.

On November 12, 1987, the Chancery Court of Warren County, Mississippi, awarded Western Surety a judgment against Joyce Perkins in the amount of $39,155.65 for reasonable and necessary attorneys' fees and expenses which it incurred and paid through September 30, 1987.

On October 28, 1987, Joyce Perkins appealed the Warren County judgment to the Mississippi Supreme Court. This appeal was made prior to the entry of final judgment. On November 5, 1987, Joyce Perkins filed a Petition for Stay on the Collection Proceedings pursuant to the judgment entered in favor of Western Surety. On November 12, 1987, the final judgment was entered in favor of Western Surety; and additionally, supersedeas bond was set at $125,000.00. Joyce Perkins filed an Emergency Motion to Review the bond; however, the Mississippi Supreme Court affirmed the amount of the bond on December 10, 1987.

Joyce Perkins procured and attempted to submit an appeal bond which failed to meet the statutory requirements. Therefore, Western Surety began collection proceedings by filing a Suggestion for Writ of Garnishment on December 21, 1987.

On December 22, 1987, Joyce Perkins filed an Emergency Motion to Quash the Writ of Garnishment which

the Mississippi Supreme Court, by Order dated December 23, 1987, remanded to the Warren County Chancery Court for determination. Shortly thereafter, Joyce Perkins filed a Motion for Leave to Amend the Bond and Western Surety filed a Motion to Quash the Purported Bond. After a hearing on January 5, 1988, the Warren County Chancery Court entered its Order denying the Motion to Amend and granting Western Surety's Motion to Quash the Purported Bond.

Next, on January 12, 1988, Joyce Perkins returned to the Mississippi Supreme Court and filed an Emergency Petition to Quash Writs of Garnishment and Attachments, to Dismiss Civil Suit and Other Relief. On January 20, 1988, the Supreme Court denied the emergency relief sought by Joyce Perkins. On that very same day, Joyce Perkins filed suit in the United States District Court for the Southern District of Mississippi seeking extraordinary relief in the form of a temporary restraining Order to stop the garnishment and to grant her relief from having to post the $125,000 bond. This request for relief was also denied.

On January 26, 1988, Joyce Perkins filed another appeal bond in yet another attempt to satisfy the statute and court order. On January 29, 1988, Joyce Perkins filed a Petition with the Mississippi Supreme Court for Re-Hearing on the Emergency Motion to Quash Writs of Garnishment, Dismiss Civil Suit and Other Relief. On February 25, 1988, the Supreme Court again remanded the issue to the Warren County Chancery Court for further hearing on the bond. On March 8, 1988, the Warren County Chancery Court entered an Order which found that the second bond filed by Joyce Perkins was also

invalid. Thereafter, on or about March 17, 1989, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court of Warren County, Mississippi. On May 6, 1988, the Warren County Chancery Court entered an Order denying the Petition for Re-Hearing. On May 13, 1988, Joyce Perkins filed her Notice of Appeal of the Chancery Court Order to the Mississippi Supreme Court.

In the meantime, on August 2, 1988, the Warren County Chancery Court entered an Order closing the Estate of Robert Taylor, Deceased, and approving the distribution of assets. Immediately thereafter, on August 4, 1988, Joyce Perkins filed a Supplemental Notice of Appeal of Separate Order Taken Under Advisement To Close Estate While Contested Supersedeas Bond is on Appeal. On August 8, 1988, Joyce Perkins filed another Emergency Motion to Grant Stay of Execution Pending the Review of the Contested Supersedeas Bond. On August 10, 1988, the Mississippi Supreme Court entered an Order agreeing to have an expedited hearing on the bond and staying the Order allowing the estate assets to be distributed. On October 14, 1988, the Supreme Court issued an Order to the Warren County Chancery Court staying the distribution of the estate's assets until December 15, 1988. On December 21, 1988, the Supreme Court of Mississippi entered a further stay until January 16, 1989, which was further extended to February 15, 1989.

On March 8, 1989, the Mississippi Supreme Court once again remanded for further hearing the consideration on the bond to the Warren County Chancery Court. On March 23, 1989, the Warren County Chancellor, rather than lowering the previously established $125,000 bond, raised the bond to the amount of $126,260.68.

On April 12, 1989, Joyce Perkins filed an Amended Appeal Bond to the Supreme Court. On April 26, 1989, the Warren County Chancery Court again reviewed the Amended Appeal Bond and determined that it was insufficient and did not constitute a valid and sufficient supersedeas bond. Immediately thereafter, on April 26, Joyce Perkins filed a Petition for Writ of Mandamus. Additionally, on April 28, 1989, Joyce Perkins filed in the Chancery Court of Warren County, Mississippi a Motion for a Stay Pending the Review of the Contested Supersedeas Bond. On that same day, the Chancery Court of Warren County, Mississippi denied Joyce Perkins' request for a further stay.

On May 31, 1989, Joyce Perkins filed a Petition for Re-Hearing on Petition for Writ of Mandamus and Stay under Rule 8(d), which was dismissed as moot on August 8, 1989, because, on that same day, the Mississippi Supreme Court rendered its opinion on the original appeal from the Warren County Chancery Court. The Supreme Court held that the trial court made a mistake in interpreting the statutes regarding whether Joyce Perkins was entitled to inherit from the Estate of Robert Taylor, and remanded the case to the Chancellor to apply the correct law. The Supreme Court also remanded the issue of whether Western Surety acted in good faith in hiring its own counsel, and whether the attorneys' fees were reasonable and necessary under the circumstances. On February 27, 1990, by Order of the Warren County Chancery Court, the court, after applying the correct statutes, again entered a judgment finding that Joyce Perkins was not entitled to inherit from the Estate of Mr. Robert Taylor, and more importantly, further found that it was

necessary for Western Surety to hire separate counsel, and that Western Surety acted reasonably and in good faith in employing separate counsel, and again awarded attorneys' fees to Western Surety, this time in the amount of $35,000.

Next, on March 6, 1990, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court for reconsideration of its February 27th Order. On April 4, 1990, the Chancellor denied the petition. Immediately thereafter, on April 11, 1990, Joyce Perkins filed her Notice of Appeal of the Chancellor's April 4th Order. On May 15, 1990, Joyce Perkins filed an Appeal Bond with the Mississippi Supreme Court with Supersedeas in the amount of $94,000 for the appeal.

B. FEDERAL COURT CASE OF WESTERN SURETY

On April 5, 1988, Western Surety filed the case *sub judice* in Federal District Court seeking reimbursement for its attorneys' fees incurred *after* October 1, 1987. Due to the numerous pleadings and cases filed by Joyce Perkins after the initial Complaint was filed, the amount of fees had to be amended. The attorneys' fees requested by Western Surety in the action filed in the United States District Court for the Southern District of Mississippi were incurred during the time frames of October 1, 1987, through August 28, 1990. These fees are neither duplicative or interrelated to the fees requested in the case currently pending in the Mississippi Supreme Court.

On December 20, 1990, the United States District Court for the Southern District of Mississippi awarded

Western Surety $75,432.47 in attorneys' fees. In affirming the District Court, the Court of Appeals correctly found that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. See Appendix, p. 3a.

On or about October 13, 1991, Petitioner filed a Petition for Panel Re-Hearing in the United States Court of Appeals for the Fifth Circuit, again alleging lack of subject matter jurisdiction. On November 13, 1991, the petition was denied. On or about February 11, 1992, Petitioner filed a Petition for Writ of Certiorari to this Court alleging that the District Court lacked subject matter jurisdiction. That Petition for Writ of Certiorari was denied on May 18, 1992. This Court also denied Perkins' Petition for Re-Hearing on June 29, 1992.

On or about December 28, 1992, more than two years after the District Court's original verdict, and after her appeal was denied by this Court, the Petitioner returned to District Court and filed a Motion to Vacate Judgment, and Motion to Quash Writ of Garnishment. In response to Petitioner's motions Respondent Western Surety, filed its motion to dismiss and for sanctions. On July 13, 1993, the District Court denied the motions of both parties. Petitioner next filed a Motion for Re-Hearing on August 4, 1993. This Petition was also denied.

Perkins next appealed to the United States Court of Appeals for the Fifth Circuit on October 26, 1993. On or about February 21, 1994, the Fifth Circuit denied Petitioner's Motion. On March 4, 1994, Perkins filed a Suggestion for Rehearing En Banc in U.S. Court of Appeals for the Fifth Circuit. The Suggestion was denied.

Petitioner now attempts to again represent to this Court that the decisions of both the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit directly conflict with a decision of the Mississippi Supreme Court. No conflict or usurpation of power exists since the subject matter of the federal court litigation was separate and distinct from the subject matter of the case pending in the Mississippi Supreme Court.

ARGUMENT

I.

PETITIONER PRESENTS NO SPECIAL OR IMPORTANT REASONS TO GRANT A WRIT OF CERTIORARI

United States Supreme Court Rule 10 clearly sets forth the hurdle which must be cleared in order for a Petition for Writ of Certiorari to be granted: "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 42. In the case *sub judice* there simply does not exist any "special and important reasons" to grant Petitioner's request for a writ. Rather, this appeal arises out of a standard lawsuit in which a surety sought indemnification from a principal under the terms of an administratrix bond. As such, this case does not present any federal or state constitutional or statutory questions nor does it present any question upon which there is a conflict in the Courts of Appeals or the District Courts. In

addition, this case does not present an important issue of federal law nor does it present a conflict between a decision of the Court of Appeals and the Mississippi Supreme Court regarding a general, non-federal matter.

To justify a grant of certiorari the "special and important reasons" must be more than "academic or episodic" the issues must "reach constitutional dimensions." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). "[T]his Court does not sit to satisfy a scholarly interest . . . [n]or does it sit for the benefit of the particular litigant." *Rice,* 39 U.S. at 4 (citing *Magnum Import v. Cody,* 262 U.S. 159, 163 (1923)). As the Court in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387 (1923), stated:

> [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Lane & Bowler Corp., 261 U.S. at 393. Accordingly, this dispute does not justify either this second appeal to the U.S. Supreme Court especially since this Court has already previously spoken to Petitioner's claims.

II.

PETITIONER'S QUESTIONS HAVE BEEN PREVIOUSLY ADDRESSED TO THE U.S. SUPREME COURT

A. CONFLICT BETWEEN MISSISSIPPI SUPREME COURT AND FIFTH CIRCUIT

In this case, the Petitioner is again attempting to assert that she is entitled to invoke the jurisdiction of the United States Supreme Court because of a conflict between a Fifth Circuit Court of Appeals' ruling and a decision of the Mississippi Supreme Court. Importantly, this argument is the exact same argument asserted by this Petitioner in her first petition to this Court for Writ of Certiorari.[2] This Court has already denied Petitioner's writ based on this argument by Order dated May 18, 1992, as well as Petitioner's Petition for Re-Hearing dated June 29, 1992. What set of circumstances could be more appropriate for the principles underlying the doctrine of *res judicata*? The reasoning behind the *res judicata* doctrine, that a final judgment of action bars any relitigation of the matters thereof in any subsequent action or proceeding is applicable to this case. "Litigation is needless if, by fair process, a controversy has once gone through the courts toi conclusion." *Angel v. Bullington,* 330 U.S. 183 (1947). This matter has previously been considered and Petitioner is only seeking yet another bite of the proverbial apple. In the absence of the *res judicata* principle, a litigant could continuously appeal cases by starting a new appeal cycle at the conclusion of her latest appeal

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[2] *See* Petitioner's Brief, Cause No. 91-1574 (1991).

loss. Respondents, such as Western Surety, would then be required to continue to respond to these appeals at each level, or risk offending the court, or perhaps finally losing at some level.

Once again, Western Surety is put to the task of responding to yet another appeal to the U.S. Supreme Court. Petitioner's assertion that there is a conflict, is incorrect. Western Surety proved at trial, and has advanced in the veritable plethora of appeals, that no conflict exists. Nevertheless, Petitioner continues to attempt to muddy the judicial waters by asserting that "the same case [as the case at bar] was on appeal to the Mississippi Supreme Court." Petitioner's Brief, p. 4. This claim ignores the fact that this case dealt with separate and distinct attorneys' fees incurred in a wholly different time frame than that of the federal court case. In its opinion affirming the ruling of the District Court, the Court of Appeals recognized that a similar case was pending in the Mississippi Supreme Court, and ruled that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. See Appendix, pp. 3a-5a.

B. FORUM SHOPPING

Petitioner's second question presented for review concerns whether the decision of the Court of Appeals conflicts with decisions regarding forum shopping. Here again, the Petitioner is reasserting an argument

previously rejected by this Court.[3] For the same reasons as set forth above, this question should not be heard by this Court. For these reasons, Petition for Writ should be denied.

III.

THE FEDERAL COURTS HAD REQUISITE JURISDICTION TO HEAR THIS CASE

It is undisputed that Western Survey chose to file two separate lawsuits, each admittedly seeking attorneys' fees pursuant to the same Indemnity Agreement. However, as previously mentioned, the time frame for which the fees are sought and the services rendered in order to produce the fees are totally separate and independent. Pursuant to 28 U.S.C. § 1332, the District Court properly invoked diversity jurisdiction over the federal court lawsuit as both the Plaintiff and Defendant were citizens from different states and the matter in controversy exceeded $10,000.00.[4] As such, the Petitioner's claim that in the present case the federal court interfered with the jurisdiction of the state court lawsuit is wholly without merit and must fail.

In addition, the Court of Appeals determined that the award of damages in this case was not dependent on a ruling in the case pending before the Mississippi

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[3] *See* Petition for Rehearing on Order Denying Petition for Writ of Certiorari, p. 4, Cause No. 91-1574 (1991).

[4] The Complaint in this matter was filed prior to the amendment of 28 U.S.C. § 1332, requiring the matter in controversy to exceed $50,000.00.

Supreme Court. See Appendix, pp. 3a-5a. Moreover, an independent determination of the reasonableness and necessity of the attorneys' fees awarded was made by the District Court in accordance with Mississippi law, and affirmed by the Court of Appeals. Petition, Appendix, pp. 3a-5a. There has been no misapplication or refusal to follow a state court decision. It has long been settled that situations such as this are not appropriate for review on certiorari by this Court. *Frances v. Southern Pacific Co.*, 333 U.S. 445, 447 (1948) and *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1949).

It must also be pointed out that the majority of the attorneys' fees awarded by the District Court and affirmed by the Court of Appeals were created by the numerous pleadings, motions and petitions filed by the Petitioner. Therefore, a more accurate statement of the issue would be that Western Surety who was required to defend excessive, harassing, and duplicative pleadings filed by a principal on a bond, should expect to receive, and should receive indemnification from the principal as clearly set forth in the parties' contract. Any other ruling would result in the cost of bonds skyrocketing.

Petitioner claims that the "multiple litigation . . . filed by Western Surety Company has been vexatious to the petitioner, and it has created an undue hardship for both the petitioner and her attorney to litigate multiple claims on the same set of facts." Petitioner's Brief, p. 4. To this the Respondent would ardently argue that it is the Petitioner who had been vexatious and created an unnecessary hardship on Respondent. It has been the Petitioner who has asserted the same arguments to this Court as it had in its first Petition for Writ of Certiorari and it is the

Petitioner who has filed appeal after appeal after appeal. The Respondent begs the point, who has caused this undue hardship? Surely the blame goes to Petitioner.

IV.

RESPONDENT'S REQUEST FOR SANCTIONS

According to Rule 42 of the Supreme Court Rules, "[w]hen a petition for writ of certiorari . . . is frivolous, the Court may award the Respondent . . . just damages and single or double costs. Damages or costs may be awarded against the Petitioner, . . . or against the party's attorney or against both." Sup. Ct. R. 42. For well over one hundred years this Court has ruled it has the power to award damages for frivolous appeals. *Wagner Elec. Mfg. Co. v. Lyndon,* 262 U.S. 226 (1923); *Southern Ry. Co. v. Gadd,* 233 U.S. 572 (1914); *Denning v. Carlisle Packing Co.,* 226 U.S. 102 (1912); *Nelson v. Flint,* 166 U.S. 276 (1897); *Gregory Consol. Mining Co. v. Starr,* 141 U.S. 222 (1891). This Court has also recently held that when a party continued a course of petitioning for Writ of Certiorari that was frivolous, malicious, and abusive, sanctions were warranted. *Demos v. Storrie,* 113 S. Ct. 1231 (1993).

The history of this case and the conduct of Petitioner leave no doubt that the excessive appeals in federal court have each been resolved against Petitioner, and it is manifest on the face of the record that the courts have not agreed with Petitioner's position. Additional and duplicative efforts make this appeal frivolous. The Respondent moves this Court for damages, not only to compensate for the work done in defending such frivolous claims, but

also in hopes that such damages will deter Petitioner from filing even more abusive and outrageous claims in the future to finally conclude this seemingly endless litigation. Respondent asks the Court that damages or such other relief as may be proper or justified under the circumstances, be awarded to the Respondent.

V.

CONCLUSION

Both of the questions asserted in the present Petition for Writ of Certiorari have previously been presented to this Court in this case by this Petitioner. Further there exists no special or important reasons to grant the petition. Accordingly, certiorari should be denied, and Respondent should be awarded damages for this frivolous appeal.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1025

WESTERN SURETY COMPANY — PLAINTIFF-APPELLEE

VS.

JOYCE PERKINS — DEFENDANT-APPELLANT

Appeal from the United States Court for the
Southern District of Mississippi
CA-W-88-0066 (B)

Before: Jolly, Davis, and Smith, Circuit Judges

PER CURIAM:*

Western Surety Company brought suit in district court seeking reimbursement of attorneys' fees pursuant to an indemnity agreement contained in an administratrix bond in which Perkins was the Principal. The jury awarded $75,032.47 to the Plaintiff. Defendant now appeals this verdict.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that local rule, the Court has determined that this decision should not be published.

On appeal, Defendant argues that the District Court interfered with the jurisdiction of the Mississippi courts, because there is a case pending in state court in which Defendant is appealing an award of attorneys' fees and expenses awarded to the Plaintiff. The Defendant also contends that the district court improperly gave the jury a preemptory instruction. Defendant claims that there is no statutory authority for granting attorneys' fees to a losing party, and that granting the fees before the case in state court is decided would be premature.

We affirm the district court's judgment. The district court has subject matter jurisdiction and personal jurisdiction.[1] A separate case pending in the Mississippi Supreme Court did not bar the district court from hearing the case.

The case now pending in the Mississippi Supreme Court involves an appeal by Perkins of the Chancery Court's Order awarding the Defendant $35,000.00.[2] The award was

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[1] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 1332, diversity jurisdiction. Joyce Perkins is a resident of North Carolina. The matter in controversy exceeds $10,000.00. The district court had personal jurisdiction pursuant to the contracts branch of the Mississippi Long Arm Statute contained in Miss. Code 1972, § 3-3-57. Western Surety Company is qualified to do business in Mississippi, and Perkins entered into a contract to be performed in whole or in part in Mississippi.

[2] The Chancery Court originally awarded Western Surety Company $39,155.65 for reasonable and necessary attorneys' fees it incurred through September 30, 1987. Perkins appealed this Order to the Mississippi Supreme Court. The Mississippi Supreme Court vacated the Order, and remanded the case to the Chancery Court in order for it to determine "whether it was necessary for Western Surety Company to employ separate

for the attorneys' fees incurred by Western Surety Company through September 30, 1987. The suit brought by Western Surety in District Court was for attorneys' fees incurred after October 1, 1987. Because the cases involved attorneys' fees incurred during two different time periods, the issues of whether they were reasonable and necessary are different. The district court did not interfere with the jurisdiction of the Mississippi courts by hearing a case that involved attorneys' fees and expenses for a different period of time than those being litigated in state court.

The district court properly gave the jury a preemptory instruction on liability, requiring it to find for Western Surety, submitting to the jury only the determination of reasonable and necessary attorneys' fees and expenses. Perkins never questioned the validity of the indemnity provision in the contract. The award of attorneys' fees is not based on any statutory authority, and does not depend on the outcome of the case now on appeal in the Mississippi Supreme Court.

For the reasons stated above, the Order of the district court is

AFFIRMED

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counsel to protect its interest, whether the surety acted in good faith in incurring those expenses with its principle, and lastly, whether the fees and expenses claims were reasonable in amount." *Perkins v. Thompson*, 551 So. 2d 204, 210 (Miss. 1989). On remand, the state trial Court found that the expenses were necessary and reasonable, and it awarded the Plaintiff $35,000.00. The appeal of the second Order is now pending before the Mississippi Supreme Court.